rulings declining to subject to auctions applicants who filed for licenses before July 26, 1993 are premised in large part on the notion that all such applicants -- regardless of the service -- should be treated in a consistently equitable manner. In any event, the prolonged state of regulatory limbo in which satellite DARS applicants have been mired is precisely the kind of situation that Congress contemplated in affording the FCC discretion to refrain from use of competitive bidding.

In sum, options two and three, and the auction process proposed in the *NPRM*,[95] are illegal for three reasons. First, in contravention of 47 U.S.C. §§ 309(j)(1), these options propose to auction spectrum in the absence of mutually exclusive license application. Second, options two and three fail to attempt to avoid mutual exclusivity in licensing proceedings as required by 47 U.S.C. § 309(j)(6)(E). Third, in contravention of 47 U.S.C. § 309(j)(7), these options would constitute the use of spectrum auctions solely to raise revenue. Finally, contrary to the rule of *Greater Boston Television*, these options propose to change the spectrum allocation policies set forth in the *Cellular Unserved Areas Order*, *MDS Order*, and Big LEO *Report and Order* without any legitimate -- much less reasoned -- basis for this change of course.

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an agency changing its course must supply a reasoned analysis.'") (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43-44 (1983)); WLOS TV, Inc. v. FCC, 932 F.2d 993, 995 (D.C. Cir. 1991) (remanding FCC denial of television station's request to acquire another station for use as a satellite because "[w]here an agency departs from preexisting policy in an administrative adjudication, it must provide 'a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored'") (quoting *Greater Boston*).

[95] *NPRM*, ¶¶ 94-111.

2. Auctions Would be Unfair and Poor Policy

Not only are auctions illegal but, as conceded by the Commission itself,[96] they also are grossly unfair to the four incumbent licensees, all of which have an enormous number of equities weighing in their favor. As recounted above, these equities in the case of CD Radio include large expenditures of time and money, as well as significant technological and regulatory contributions. While it has been over five years since CD Radio filed its original DARS application, the Commission has appropriately concluded that a more accurate measure of regulatory delay is "red tape years," or the total years all applications have been on file prior to grant. In the case of satellite radio, this total is a staggering 13.5 years.[97]

During these 13.5 red-tape years, in which the incumbent applicants have been halted at the starting gate, they have continued to invest enormous sums of time and money in good-faith reliance on the FCC adhering to its cut-off date. CD Radio has expended over $15 million to date trying to make satellite DARS a reality, and will incur an additional $20 million to date due to the delay in licensing the service. Complex engineering issues that must be overcome if satellite DARS is to succeed have been resolved. At great cost to its investors, CD Radio has designed (1) the smallest satellite dish in the world; (2) a highly efficient, seamless service technology, (3) advanced mobile satellite receivers to deliver and receive multichannel CD-quality music and aural services nationwide, and (4) perceptual audio coding techniques to compress digital data. In addition, CD Radio has incurred huge

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[96] *Id.*, ¶ 34.

[97] 5.25 years for CD Radio's application + (2.75 years/application * 3 other applications).

expenses formulating its business plan, raising significant capital, conducting extensive market research, and contracting with manufacturers.

Furthermore, CD Radio has virtually singly-handedly been the driving force in the extremely expensive regulatory battle to bring satellite DARS to the American public. CD Radio went beyond its initial filing and took the lead in locating and clearing spectrum for DARS by working with the FCC, NTIA, DOD and the relevant frequency coordinator to locate S-Band spectrum for this service.[98] CD Radio -- at the Federal Government's request[99] -- actively joined in current standards bodies relating to DARS. Indeed, CD Radio is the only applicant that has actively participated in the EIA Digital Audio Radio Subcommittee and in the NRSC DAB Subcommittee since their founding over two years ago.[100] Finally, after locating the S-Band spectrum, CD Radio developed and deployed an experimental DARS system which conclusively demonstrated the viability of an S-Band satellite DARS.

Moreover, auctioning spectrum at this point would not only risk wasting these expenditures, but also would discourage other applicants, in other new services, from innovating and "fighting the good fight" to provide consumers new services. As noted above, CD Radio and the other applicants have worked to resolve spectrum sharing conflicts

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[98] *See* Petition for Rulemaking and Applications of Satellite CD Radio (filed May 18, 1990).

[99] *Cf. NPRM,* ¶ 51 ("We also encourage satellite DARS proponents to continue to participate actively in standards setting organizations such as the National Radio Systems Committee (NRSC) and the Electronics Industry Association (EIA).")

[100] Besides continuous meeting attendance, CD Radio has made financial contributions and sponsored numerous major Subcommittee actions.

and eliminate mutual exclusivity. Opening the spectrum for auction at this time would actually punish this work, and further reduce incentives for future applicants. The Commission simply cannot turn its back on the equities involved. Indeed, as stated above, CD Radio and other developers of satellite DARS have a right to proceed without the additional delay and expense of auctions as a matter of equity.[101]

The *NPRM* suggests that incentives might be preserved if the existing applicants received a dollar-for-dollar bidding credit in any auction.[102] This is clearly inappropriate for the simple reasons that the amount of the required bidding credit would itself make auctions impossible. While CD Radio has invested $15 million in satellite DARS, this sum represents only investors' out of pocket expenses. Hence, an equivalent credit is unacceptable because it would rob the venture capital investors of *any return* on their money in a highly risky endeavor over the course of five years. Innovative communications companies will find it difficult indeed to raise the capital required to design and construct systems if they rightfully fear that the upside potential of their contribution can be eliminated by regulators even before the service is created.

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[101] *See* 47 U.S.C. §§ 309(i) & (j); Budget Act, Pub. L. No. 103-66, § 6002(e) (Special Rule), 107 Stat. 312, 397 (1993); News Release, *FCC Daily Digest*, July 28, 1995, Commission Proposes Plan to Roll Out Wireless Services (Separate Statement of Commissioner James H. Quello) ("Congress intended for us to exercise discretion to weigh the equities" as to whether auctions are appropriate for each new service licensed) (footnotes omitted).

[102] *See NPRM*, ¶ 35.

C. Option One Is Legal, Equitable, and in The Public Interest

Option one -- division of the allocated spectrum among the applicants -- suffers from none of the aforementioned deficiencies. Because this is the only option that is legal, equitable, and in the public interest, it should be promptly adopted by the Commission. Such action would allow CD Radio and the three other incumbent licensees to end the *13.5 red tape year* log jam and get on with their original mission -- providing high quality satellite radio services to the American public.

In stark contrast to options two and three, option one respects the application cut-off imposed by the Commission over three years ago. As detailed above, the sanctity of a final cut-off is vital to the interest of all parties with business before the FCC. Further, option one is the only licensing scheme that avoids auctioning where there is no mutual exclusivity. Auctions are an efficient and legal means of allocating spectrum only if the demand for spectrum exceeds the supply. However, if there is sufficient spectrum for all timely-filed applicants, auctioning the spectrum is prohibited by statute, and contrary to consumer interests in having access to the least expensive service possible. Indeed, in the absence of mutually exclusivity -- as is the case here -- the sole rationale for an auction is to raise money for the United States Treasury, a goal that is squarely prohibited by the competitive bidding legislation.

As with its approach in the Big LEO proceeding, the Commission should recognize that auctions are only appropriate if mutual exclusivity arises later on: for example, if one or more licensees fail to meet financial milestones and other applicants apply. Until that

happens, the auction statute and sound spectrum management principles preclude the use of auctions.

As with re-opening the cut-off, it is instructive to note that the entities most interested in auctions here are the broadcasters, ever fearful of the putative potential competition of DARS systems. It is ironic, although not surprising, that broadcasters insist that their competitors bid for spectrum, while strongly opposing similar auction proposals as applied to broadcasters. The Commission should not reward such gamesmanship that has as its sole goal delay and the protection of entrenched interests. Rather, the agency should reject auctions and license the existing applicants in accordance with the frequency plan submitted this day.

IV. THE PROMPT INTRODUCTION OF SATELLITE DARS WILL PRODUCE A NUMBER OF SIGNIFICANT PUBLIC INTEREST BENEFITS

The major public interest benefits that satellite DARS will bring to American consumers overshadow any negligible impact that the new service will have on the financial prospects of conventional radio broadcasters. The prompt commencement of satellite DARS will not only make possible a diversity of radio programming, enhanced service to rural areas, and improved U.S. competitiveness, but also spur terrestrial broadcasters to strengthen their local programming and upgrade more quickly to digital service. Traditional broadcasters' allegations of competitive injury -- claims that are legally irrelevant and economically unsound -- pale in comparison to these benefits. CD Radio and other satellite DARS proponents developed a substantial record in the Commission's allocation proceeding

documenting through sound economic analysis the minimal impact of satellite DARS on the financial well being of the terrestrial broadcasting industry. Hence, the public interest strongly favors expeditious licensing of satellite DARS.

By promptly adopting service and licensing rules for satellite DARS, the Commission will allow the American public to enjoy a host of important benefits that cannot be provided by any other medium.

First, satellite DARS will promote a diversity of radio programming. By virtue of the medium's national reach, satellite DARS providers can aggregate relatively small, dispersed ethnic, cultural and other "niche" audiences that go unserved in today's radio market. As the Commission noted in the *Allocation Order*, United Church of Christ and the National Asian American Telecommunications Association, among many other such groups, have gone on record supporting satellite DARS because it is uniquely able to serve non-mainstream audiences.[103]

On September 7, 1994, CD Radio submitted as an *ex parte* filing in the allocation proceeding materials that identified a number of woefully underserved segments of the American listening public -- including special interest and non-English language formats -- that CD Radio will target.[104] In 1994, there were only 12 stations programming a children's format, one station with a literature/drama format, one station with an Italian

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[103] *Allocation Order*, 10 F.C.C. Rcd at 2311.

[104] *See* Ex Parte Filing of CD Radio Inc., entitled "Satellite Radio," authored by InContext Inc., dated August 1994 (the "Lilley Study") at Appendix A.

language format, and not a single station with a Chinese language format.[105] In addition, the Study highlighted the fact that while the great majority of radio stations are devoted to popular music, a trifling number of stations provide ethnic and less popular music formats. The Study found only 38 blues formats, 18 blue grass formats, 11 folk formats, and 6 polka formats.[106]

Because satellite DARS is a multi-channel service, natural economic incentives will promote a diversity of radio formats. In contrast, a terrestrial broadcaster programming a single station will aim for the median listener with "lowest common denominator" fare that leaves minority interests unserved.[107] Thus, in order to attract the largest possible number of subscribers, each licensee can be expected to offer many specialized, niche channels that appeal to the segmented demographics that characterize modern American markets. It would not be economically efficient to "cannibalize" market share by filing satellite capacity with duplicative mass-market programs, because this will not materially add to the total subscriber base. Instead, the successful satellite DARS provider will identify groups of citizens who are unserved by such fare and will creatively develop programming that meets those groups' needs and tastes. Clearly, the larger the number of channels each satellite DARS licensee can offer, the greater the programming diversity. Thus, for the sake of programming

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[105] *Id.* at 24-27.

[106] *Id.*

[107] *See, e.g.*, Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting,* 66 Quarterly J. Econ. 194 (1952). *See also* Review of the Commission's Regulations Governing Television Broadcasting, 10 F.C.C. Rcd 3524, 3550-51 (1995); Revision of Radio Rules and Policies, 9 F.C.C. Rcd 7183, 7186 (1992).

diversity, the Commission should assign sufficient spectrum to each licensee to allow them to offer this rich variety of programs.

It should be noted that diversity in terrestrial broadcasting occurs only in the largest markets, where it becomes economically possible (and even necessary) for some stations to appeal to segmented tastes. In the multi-channel satellite environment, even one licensee will have a greater variety of programs, and the four licensees contemplated will create even more diversity and competition.

The new wealth of diverse radio formats that satellite DARS entrepreneurs will bring to the American listening public thus represents a natural evolution of the FCC's *1976 Policy Statement* in which the Commission found that market forces were the best available means of producing diversity in entertainment formats.[108] Indeed, as an economic matter, firms such as CD Radio cannot survive in the radio market simply by replicating existing formats if they hope to persuade consumers to purchase a new and more costly radio and pay subscription fees. Satellite DARS providers have powerful incentives to offer distinct, innovative programming that is not available to radio consumers today. Hence, by expediting the emergence of a new mode of audio services, the Commission will encourage a diversity of formats to flourish, consistent with its longstanding and economically sound policy.

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[108] *See* Memorandum Opinion and Order, 60 F.C.C.2d 858 (1976) (*1976 Policy Statement*), *recon. denied*, 66 F.C.C.2d 78 (1977), *aff'd*, FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

Second, satellite DARS will bring radio service to unserved and underserved rural and remote areas. Rural areas for the first time will have access to thirty channels of audio programming, all in CD-quality sound. CD Radio's Study found that a striking number of Americans lack a diversity of radio services. Specifically, 1 million people receive no FM stations, 1.6 million receive only one FM station, and 22 million receive five or fewer FM stations.[109] Satellite DARS will thus provide rural and underserved areas for the first time with access to the same high quality and quantity of radio programming that currently is available only in the major metropolitan areas. For this reason, state associations representing rural Americans and a non-profit organization promoting education in rural areas voiced unequivocal support for satellite DARS in the *Allocation Order*.[110]

In this fashion, the licensing of satellite DARS will further the Commission's longstanding policy of promoting expanded service to the public.[111] More fundamentally, such action will comport with the agency's duty under Section 307(b) of the Communications Act to provide for a dispersal of radio services "among the several States and communities" in order "to provide a fair, efficient, and equitable distribution of radio service to each of the

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[109] *See* Lilley Study at 23.

[110] *Allocation Order,* 10 F.C.C. Rcd at 2311 (comments of Maine Farm Bureau Association, Wyoming Farm Bureau Association, and the Education Development Center).

[111] *See, e.g.*, AM Expansion, 6 F.C.C. Rcd 6273 (1991): Commercial FM Broadcast Allocations, 94 F.C.C.2d 152 (1983) (Docket 80-90), *recon.*, 97 F.C.C.2d 279 (1984); Direct Broadcast Satellites, 90 F.C.C.2d 676 (1982), *aff'd in relevant part sub nom.*, National Ass'n of Broadcasters v. FCC, 740 F.2d 1190 (D.C. Cir. 1984).

same."[112] Unlike most other new communications services, satellite DARS will be immediately available to -- and in numerous respects designed to serve -- the many millions of rural Americans.

Third, satellite DARS will offer American consumers continuous radio service of high audio disc quality, a service enhancement representing a quantum leap over existing radio broadcast service. The fact that this service will now be available in a mobile environment *i.e.*, to cars, represents a particular technological leap.

Fourth, satellite DARS will improve U.S. competitiveness and create new jobs and economic opportunities for Americans. It is becoming increasingly clear that the U.S. must move forward quickly with the development of satellite DARS if it is to remain competitive with similar efforts in other countries. Since CD Radio first proposed satellite DARS over five years ago, the U.S. has ceded considerable ground to its foreign competitors and now is in danger of losing its leadership position. The European Eureka 147 DAB system and its underlying standards are gaining international support and a proposal is pending to launch a satellite DARS system using this European technology perhaps as soon as the end of the decade. As discussed below, the Eureka 147 DAB system also is being tested in the U.S. by the DAR subcommittee of the Electronics Industry Association ("EIA") and the DAB subcommittee of the National Radio Systems Committee ("NRSC"). Thus, there is a compelling need for the FCC to license domestic providers expeditiously in order to preserve

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[112] 47 U.S.C. § 307(b).

and strengthen U.S. industry's position in the fast emerging international market for satellite DARS.

Moreover, as the *NPRM* recognizes, the satellite DARS industry will create domestic jobs in a number of related fields including engineering, manufacturing, music and programming production. A representative, but by no means exhaustive, list of the manufacturing and professional jobs that will be created includes: construction of satellites; satellite launch and control; production of antennas and radio receivers, receiver chip sets, and other components; installation and integration of radio receivers and antennas in automobiles; creation of music and talk shows; building program origination facilities; building satellite uplink and telemetry, tracking and command facilities; and construction and operation of customer service centers. These job opportunities might be first filled overseas if the Commission falters in its efforts to allow satellite DARS to advance. Given market realities, foreign countries' lead in satellite DARS could prove insurmountable, and U.S. jobs could be forfeited for good.

Further, prompt licensing of satellite DARS will promote widespread consumer use and acceptance of digital audio radio, thereby spawning efficiencies and advances in the technology. The technology developed for satellite DARS includes a number of advances in satellite and radio design, including micro-antennas, low noise radio amplifiers, multipath mitigation, high efficiency chipset processors, and music compression techniques. These seminal technologies are expected to facilitate advances in non-satellite DARS services.

Fifth, basic economic analysis indicates that the advent of satellite DARS will prompt terrestrial broadcasters to strengthen their signature local news, weather, traffic and sports programming.[113] In an increasingly competitive radio market, traditional broadcasters' unique selling point for both advertisers and listeners have been and will continue to be the provision of local content. To capitalize fully on their paramount competitive advantage over satellite DARS, conventional broadcasters will devote even greater resources to the ascertainment of local interests and the production of more local programming.[114] Hence, by spurring existing broadcasters to become stronger competitors in their local markets, satellite DARS represents a simple and highly efficient way to promote the Commission's localism goal.

In a similar manner, the competitive entry of satellite DARS providers into the radio market will spur terrestrial broadcasters to go digital. Terrestrial broadcasters will be able to deploy in-band on-channel ("IBOC") DARS technology well before satellite DARS licensees can provide similar service. Testing of such systems is rapidly progressing and will soon be

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[113] *Cf.* "Hundt: Radio Is Strong," *Radio World*, August 23, 1995 at 14 ("I personally think there is a very good chance that a national satellite radio service will intensify the inherent advantages of local markets that stations have.").

[114] To the extent that some satellite DARS providers offer an advertiser-supported service, existing broadcasters will step up their efforts to deliver local advertisers larger local audiences and enhance the local content of their programming. The Commission has previously found that where radio stations compete for advertising revenue "one of the stations likely may choose to alter its programming to reach a different segment of the audience and the advertising market." Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations, 3 F.C.C. Rcd 638, 640 (1988), *recon.*, 4 F.C.C. Rcd 2276 (1989).

complete. The DAR subcommittee of the EIA and the DAB subcommittee of the NRSC have finished laboratory testing of nine terrestrial DAR technologies, and the test results were reviewed and discussed in late August. Further, field testing is scheduled to begin shortly on seven of those systems (and one special mode of one of the systems) tested in the laboratory.[115] When the subcommittee's testing work is accomplished in the near future, terrestrial broadcasters will have the ability to implement DARS systems without significant regulatory impediment. Commenting on terrestrial DARS recently, FCC Chairman Hundt stated that he has "heard only positive things about the technological progress. People are constantly giving me optimistic reports."[116]

In contrast, the commencement of satellite DARS is years away. Even after service and licensing rules are in place, construction permits obtained and financing complete, satellite DARS will not be available to the public for the several additional years it takes to construct and launch satellites.

Yet the unwavering determination of firms such as CD Radio to provide satellite DARS to the American public is acting as a powerful catalyst for terrestrial broadcasters to go digital. A representative of the NAB candidly has admitted as much. John Abel, until recently the executive vice president of NAB, stated that while some radio broadcasters have resisted terrestrial DAR, "they probably have little choice because of almost certain

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[115] The seven systems are: in-band adjacent channel ("IBAC") system AT&T; IBOC systems AT&T/AMATI, USADR-1, USADR-2, USADR-AM, other band system EUREKA-147, and satellite system VOA-JPL.

[116] "Hundt: Radio Is Strong," *Radio World*, August 23, 1995 at 14.

competition from satellite and other digital audio services."[117] Given the prospering fortunes of today's radio industry (discussed *supra*), broadcasters otherwise would lack incentives to deploy DARS for the simple reason that it does not guarantee new advertising revenues. The licensing of satellite DARS providers will thus hasten the advent of terrestrial DARS. Simply put, broadcasters' fear of increased competition from satellite DARS providers -- even before those providers are licensed -- is inuring to the advantages of consumers and will almost certainly continue to do so in the future.

In sum, the prompt commencement of satellite DARS will result in a raft of public interest benefits unique to this new communications medium. Primary among these benefits is increased consumer choice from among a true diversity of aural services. Given these advantages to consumers and to the national economy, any slight impact of satellite DARS on traditional radio would be in the public interest.

V. SATELLITE DARS WILL HAVE NO MORE THAN A TRIVIAL IMPACT ON THE FINANCIAL HEALTH OF TRADITIONAL RADIO BROADCASTERS.

An ample record has been developed in the allocation proceeding to show that satellite DARS will have only a minimal economic effect on the thriving conventional radio business. More fundamentally, however, CD Radio believes that the inquiry called for by the *NPRM* is both inappropriate and legally irrelevant. The courts and the Commission, drawing on sound economic analysis, have long since abandoned the counterintuitive view that the public

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[117] *Communications Daily*, Oct. 22, 1992 at 7. *See also The Washington Post*, Fast Forward Section, November, 1994 at 8.

interest can be harmed by the licensing of new competitors. In any event, the decidedly optimistic opinions of financial analysts as to radio's future and the extraordinary performance of radio stocks in recent years constitutes compelling evidence that allegations of grave competitive harm to radio from satellite DARS are rhetoric rather than reality.

A. Both As a Matter of Law and Policy, the Commission Should Not Consider Any Alleged Harm to Broadcasting

As a threshold matter, the economic impact of satellite DARS on existing broadcasters is no longer a legally relevant consideration for this Commission. Beginning some twenty years ago, but accelerating in the past few years, this Commission has determined to impose economic regulation on telecommunications businesses only following evidence of market failure. Chairman Hundt in particular has fundamentally redefined the role of the agency: "We are the Federal Competition in Communications Commission."[118]

In this light, Chairman Hundt has squarely rejected economic protectionism and sheltering existing operators from new technologies:

- I want to note how much I support the basic policy thrust of promoting competition in telecommunications market.. . .The Commission has long worked to foster competition.. . .The Commission's role is removing barriers to entry by new competitors and ensuring that users have access to competing service providers. . . [The Commission has confronted] unnecessary or duplicative regulations that increase costs and hinder development of fully

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[118] Reed E. Hundt, Speech before the National Cable Television Association, at 8 (May 9, 1995) [NCTA Speech].

competitive markets in telecommunications services. This is a fundamental aspect of the Commission's responsibilities.[119]

- Even if there is no new law, the Commission will keep promoting competition in communications markets.[120]

- I believe markets generally work to the best interest of everyone, if they are competitive. I don't believe bureaucrats should pick the winners in competition for licenses. I don't believe the FCC should exist in order to protect incumbents from what is euphemistically called 'too much competition.'. . . By advocating competition in all communications markets, we at the FCC are spelling out the end of the old regime of regulation. . . . In broadcasting policy too we must begin to follow the new paradigm.[121]

Applications of these same principles should encourage the Commission here to license qualified satellite radio applicants and reject the pleas of incumbent "chicken little" broadcasters.

Indeed, with specific reference to broadcast competition, the FCC has already changed the rules to comport with these policies. Under its *"Carroll"* doctrine, the FCC obligated itself to consider the economic impact of new service on existing broadcasting stations if substantial harm was sufficiently alleged.[122] However, in 1989, the Commission

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[119] Statement of Chairman Reed E. Hundt on H.R. 1555 at 1, 3, 4-5 (May 11, 1995).

[120] NCTA Speech, at 3.

[121] Reed E. Hundt, Speech before the Museum of Television and Radio, at 1-2 (May 23, 1995).

[122] *See* Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958). Notably, the NAB opposed the Commission's order licensing DBS on this basis. *See National Ass'n of Broadcasters*, 740 F.2d at 1221 (rejecting the NAB's argument that a *Carroll* hearing was necessary before granting a DBS application).

abandoned the *Carroll* doctrine based on its finding that the doctrine is unsound as a matter of economic policy.[123]

The Commission determined that the theory underlying the *Carroll* doctrine -- that increased competition can be detrimental to the public interest -- is analytically and factually defective. Indeed, of the 80 broadcast cases where *Carroll* injury had been alleged, the Commission found that not a single complainant was able to show that the alleged harm would in fact result in a net loss of service to the public.[124] To the contrary, the Commission found that "the *Carroll* doctrine may have the undesired effect of providing existing licensees with an anticompetitive tool to delay the entry of new [competitors]" and that the competitive effect of a new service provider on a broadcasting station tends to be "an overall increase in service redounding to the benefit of the public."[125]

A case strikingly similar to that presented by broadcasters here has already been decided by the Commission. In its decision in *Direct Broadcast Satellites*, the Commission authorized additional competition in the video marketplace, despite the gloom and doom predictions of broadcasters:

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[123] *See Detrimental Effects*, 3 F.C.C. Rcd at 639-42.

[124] *Id.* at 639-40.

[125] *Id.* at 640. Even the *Carroll* court acknowledged that "private economic injury is by no means always, or even usually, reflected in public detriment. Competitors may severely injure each other to the great benefit of the public." *Carroll*, 258 F.2d at 443.

- The Commission cannot reject a new service solely because its entry will reduce the revenues or profits of existing licensees.[126]

- We should not refuse to authorize a potentially valuable new service solely on the basis of speculative allegations concerning possible reductions in service from other sources.[127]

- In contrast to the speculative nature of the claims of injury to conventional broadcasting and subscription service, the benefits that DBS could provide appear quite certain.[128]

- DBS systems could provide the first television service in some geographic areas, and could offer an increase in the number of channels and the variety of programming throughout the country. DBS systems might also offer services not previously available, such as high-definition television, stereophonic sound, or dual-language sound tracks, more readily than terrestrial program sources. The evidence we cited indicates that American viewers would find such an increase in the availability of television service extremely valuable.[129]

- Even if DBS systems were likely to affect the availability of programming from other sources, we believe that their potential benefits are sufficiently great to outweigh some loss of other programming.[130]

In determining to allocate spectrum and license qualified applicants -- a process that took substantially less time then the five-and-one-half-years CD Radio has waited -- the agency

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[126] *Direct Broadcast Satellites*, 90 F.C.C.2d 676, 689 (1982) ("DBS").

[127] *Id.* at 691.

[128] *Id.* at 692.

[129] *Id.*

[130] *Id.*

specifically rejected claims that Section 307(b) of the Act necessitated the disapproval of any nationwide broadcasting service.[131]

Without hesitation, the D.C. Circuit affirmed the Commission's conclusion that "DBS competition was in the public interest -- despite the inability of DBS to broadcast local programming *and given even the possibility that terrestrial broadcasters might suffer some audience loss and that some stations might be destroyed altogether.*"[132]

- It would be anomalous to read the Act to prevent the FCC from authorizing an innovative system of technology capable of conferring substantial benefits on all Americans.[133]
- The Act does not entrench any particular system of broadcasting: existing systems, like existing licensees, have no entitlement that permits them to deflect competitive pressure from innovative and effective technology.[134]
- DBS will merely supplement the existing local broadcast system, rather than replace it.[135]
- When new technology permits the statutory objectives to be attained through novel means that require the alteration or abandonment of past Commission policies, the Commission may adjust its means to [retain] fidelity to the legislative end.[136]

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[131] *Id.* at 685. *See also NPRM*, ¶ 10.

[132] *National Ass'n of Broadcasters*, 740 F.2d at 1221 (emphasis added).

[133] *Id.* at 1198.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 1199.

- We therefore find little need to tarry long on the argument of the local broadcasters that the statute immunizes them from DBS competition. Because DBS has the potential to yield broadcast services that significantly further the public interest, a finding of the Commission not truly disputed by any of the parties, the Commission acted well within its powers in approving the non-localized broadcasting characteristic of DBS.[137]

The creation of service rules and the licensing of satellite DARS applicants falls squarely within this precedent.

Given that the Commission has already done the "heavy lifting" -- and been affirmed by the court -- the same analysis promptly dispatches broadcasters' complaints of competitive injury and allow consumers to enjoy the benefits of satellite DARS as soon as possible. The Commission has already concluded that competition is *per se* in the public interest; broadcasters' claims to the contrary should be viewed with extreme skepticism given their inglorious (if understandable) history of "crying wolf" under the *Carroll* doctrine. Furthermore, if broadcasters' dire predictions of satellite DARS driving them out of business were genuine, the broadcasters would have striven to provide satellite DARS, which they conspicuously have chosen not to do. Given the demise of the *Carroll* doctrine and the many pro-consumer benefits that satellite DARS will make possible (discussed above), CD Radio believes that the Commission should license the applicants without respect to any alleged competitive impact on traditional radio.

Between "chicken little" and "crying wolf," broadcaster requests for protection from competition should be dismissed as the fairy tales they are. A better analogy is the

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[137] *Id.*

Commission's recent decision in the *Big LEO* proceeding, where it has allocated 33 MHz of spectrum and licensed several companies to offer global mobile services.[138] Nowhere in that proceeding did the Commission pause to consider the effect these new services might have on the cellular industry. Rather, the Commission properly has moved ahead with LEOs, with PCS, and other mobile technologies, secure in the knowledge that the American public will benefit from the enhanced efficiencies of spectrum use and increased competitive entrants. The same principles are true in satellite DARS as well, and the Commission should so declare.

B. Even if the Commission Examines Competitive Impact, It Is Plain That Satellite DARS Will Not Harm Traditional Broadcasting

In the *NPRM,* the Commission asked commenters to submit economic data regarding the potential effect of satellite DARS on the broadcast industry.[139] Attached as Appendix A is a study authored by InContext (the "Lilley Study"), headed by William Lilley, former Vice President of CBS and a former member of the NAB board of directors.[140] This study conclusively demonstrates, *first*, that radio broadcasting is profitable and vibrant, and *second,* that -- even under a worst-case analysis -- the introduction of satellite radio would not hurt the industry or, more importantly, the radio service received by the public. Indeed, FCC

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[138] *See* Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 F.C.C. Rcd 5936 (1994).

[139] *NPRM*, ¶¶ 10-20.

[140] *See* Lilley Study at Appendix A.

Chairman Hundt recently commented that "[w]e should let DARS compete with terrestrial. Every instinct tells me that the results of that competition will be better radio service for the American public. And there is no reason to assume that terrestrial will do poorly in this competition."[141]

1. The Broadcasting Market Is Healthier than Ever

Traditional radio broadcasting is an economic powerhouse that is not in need of government protection. All of radio's "vital statistics" point toward a thriving industry whose prospects have not been dimmed in the slightest by the coming of satellite DARS competition. No less an authority than FCC Chairman Reed Hundt has stated that "I think right now radio is a very strong industry, doing very well economically."[142] Indeed, as described in the attached Lilley Study -- and summarized below -- radio today is in as good a shape as any communications industry has ever been, for several reasons.

First, the number of radio station transactions in 1993 -- approximately 1,000 -- was significantly greater than even the most heady days in the late-1980's. In 1987, the high-water mark for transactions in the 1980's, there were approximately 800 transactions. Similarly, a report released by the NAB in 1994 showed dramatic increases in the dollar volume of sales of radio stations: up 127 percent from 1992 and 47 percent from 1993.[143]

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[141] Reed E. Hundt, Speech before the NAB Radio Show at 8 (September 8, 1995) [NAB Speech].

[142] "Hundt: Radio Is Strong," *Radio World*, August 23, 1995 at 14.

[143] NAB, Trends in Radio Station Sales: 1992-1994 at B-2 (Schutz ed.).

Standing alone, the strong demand for radio facilities is clear evidence that the industry is thriving.

Similarly, cash flow multiples in 1993 also were higher than ever before, with stations trading at an average 11.1% times cash flow.[144] The best indicator of the radio industry's health is what buyers are prepared to pay for stations, not the number or percentage of radio stations losing money.[145] Broadcasters who cite some stations' apparent lack of profitability as evidence of the likely detrimental impact of satellite DARS are conveniently ignoring such factors as high debt burdens for newly-purchased stations, newly licensed stations with start-up advertising revenue levels, and unusual accounting procedures (*e.g.*, the owner/manager is paid a very high salary). It is axiomatic that buyers of stations would not be paying record cash flow multiples if stations -- independent of their owners' balance sheets -- were in fact not able to generate healthy revenues. Furthermore, it is obvious that cash flow multiples reflect analysts' best estimates of future cash flow in the industry; media experts and brokers, who obviously know about future satellite DARS implementation, remain bullish on traditional radio.

Second, the economic vibrancy of radio today is conclusively confirmed by the soaring performance of radio stocks. While the *NPRM* attempts to chronicle thoroughly the sundry factors that bear on an analysis of the economic impact of satellite DARS on traditional radio, CD Radio believes that the price of radio stocks is a more reliable and

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[144] Lilley Study at 9.

[145] *Id.* at 15.

comprehensive indicator. The stock price takes into account in an authoritative fashion the future prospects of the radio industry, including competition from satellite DARS. Significantly, radio stocks have been "flourishing" in 1995, and are up an average 50 percent.[146] The collective wisdom of the stock market thus utterly belies broadcasters' self-serving predictions of financial ruin at the hands of satellite DARS.[147]

Third, average radio station cash-flow margins (sales dollars before taxes and depreciation) were similarly robust in 1993 at 26.3 percent. This figure is well above the average for all other media and well above the average for all other media.[148] Significantly -- and contrary to the claims of the NAB -- radio stations large and small have enjoyed escalating margins. Indeed, the average cash flow margin of small stations (those with net revenue of between $250,000 and $750,000) more than doubled from 7% in 1990 to 17% in

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[146] *See, e.g.*, Donna Petrozzello, "Radio Stocks Flourish in First Half," *Broadcasting & Cable*, July 10, 1995 at 35 ("Radio stocks are up an average 50% . . . pushing these stocks up to the Stratosphere . . . These stocks should do no worse than the market overall and will probably come out ahead of the market.") (quoting Harry DeMott, Stock Analyst of First Boston).

[147] *See, e.g.*, "Radio Stocks Riding High After Senate Dereg Vote," *Radio & Records*, June 23, 1995 at 1, 13 ("The Senate's approval of legislation eliminating radio ownership limits sent stocks soaring on the winds of investors' dreams of mega-groups with mega-cash flow . . . Kagan's radio index rose 19% from mid-May to mid-June"). Indeed, both the House and Senate bills -- H.R. 1555 and S. 652 respectively -- eliminate the provisions of 47 C.F.R. § 73.3555 that limit the number of AM or FM radio stations that may be owned or controlled by one entity either nationally or in a particular market. If either of these bills is enacted into law, traditional broadcasters apparently could amass multiple stations in every large and medium-sized city. Passage of such a law would thus substantially bolster the economic fortunes of traditional broadcasters.

[148] *Id.* at 9.